IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Appellant,	)	
vs.	)	No. 20178
SHIRLEY C. THOMPSON,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases (Cont.)

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APPELLANT'S REPLY BRIEF

Appellee reasons that since she and Joel Bailleres were not "legally" married nor related by blood, she could not be a member of Bailleres' "family" so as to fall within the household exclusion of appellant's policy. The error of appellee's reasoning is exposed by the cases of State Farm Mutual Auto Ins. Co. vs. James, 80 F.2d 802 (CCA W. Va. 1936), and the case of Hunter vs. Southern Farm Bureau Casualty Insurance Co., 241 S. C. 446, 129 S.E. 2d 59 (1962). In both of these cases the court held the household exclusion to apply to a person unrelated by blood or marriage to the insured. In the Hunter case, as here, a "legal" marriage was impossible since one of the parties was already married to another person, however, the court held the claimant to be excluded as a member of the family of the insured.

The "ambiguity" which appellee urges the court to

find in appellant's policy is illusory at best. Certainly, as appellee argues, the determination of whether a given person is a member of the family will vary with the facts of each case concerning the living arrangements of the parties. However, the multitude of cases cited by both appellant and appellee disclose none in which the courts found any ambiguity whatsoever in the household exclusion clause.

Appellee cites no authority contrary to the Hunter case. However, appellee argues that since she and Bailleres quarreled and separated several months after the accident, they had no "permanent domestic relationship" such as that in the Hunter case. The record, however, clearly demonstrates the domestic character of appellee's relationship with Bailleres. They lived together as husband and wife (T.R. 33) and, indeed, appellee believed herself to be lawfully married to Bailleres (T.R. 31). She told her friends he was her husband (T.R. 68, 75); they ate together (T.R. 68, 75), and had sex relations (T.R. 56, 59).

The household exclusion of appellant's policy excludes coverage only of those who are members of the family of the insured at the time of the accident. The fact that appellee and Bailleres separated several months thereafter could not retroactively affect the coverage or exclusions of appellant's policy.

Appellant respectfully submits that, under the above

facts and authorities, the trial court erred in granting judgment in favor of appellee and in failing to grant judgment in favor of appellant.

Appellee's argument that the court below did not find Bailleres guilty of non-cooperation is not borne out by the record. In its answer, appellant affirmatively alleged that Bailleres had wholly and totally failed, neglected and refused to cooperate with appellant insurer thereby relieving appellant from any obligation whatsoever to the said Bailleres or to appellee Shirley C. Thompson (R.T. 4-6). Motions for summary judgment were filed by both appellant and appellee supported by affidavits, letters, and further documents. Although appellee Shirley C. Thompson denied that at the time of the collision she was a member of the family of Joel Bailleres, she did not in any way deny nor controvert appellant's proof that Bailleres had been guilty of non-cooperation. Rather, appellee chose to confess such non-cooperation seeking to avoid the defense by relying on the case of Jenkins vs. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145 (1964).

On February 18, 1965, the court below ruled granting appellee's motion for summary judgment and denying appellant's motion for summary judgment (R.T. 112). The question arose as to whether appellant should be liable for the entire $10,000.00 policy limit (R.T. 19), or the $5,000.00 limits

required by the Financial Responsibility Law of Arizona at the time of the accident.

§28-1170 G, A. R. S., provides:

> "A policy which grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and the excess or additional coverage shall not be subject to the provisions of this chapter. With respect to a policy which grants the excess or additional coverage the term 'motor vehicle liability policy' shall apply only to that part of the coverage which is required by this action."

The matter was extensively briefed and argued, and the court below ruled sustaining appellant's position and awarding to appellee judgment in the sum of $5,000.00 (the Financial Responsibility Limit) rather than the $10,000.00 (appellant's policy limits) (R.T. 28); in so ruling, the court, of necessity, determined that appellant's defense of the non-cooperation of Joel Bailleres was valid as to the excess coverage of appellant's policy over the limits required by the Financial Responsibility Law.

Matters which have been raised by the pleadings in a case are considered determined as between the parties. Grand International Brotherhood of Railroad Engineers vs. Mills, 43 Ariz. 379, 31 P.2d 971 (1934). Appellee's argument that the record before this court does not show sufficient evidence upon which the trial court based its determination of non-cooperation is improper for several reasons:

1. Appellee raised no objection whatsoever in the

trial court concerning appellant's evidence of Bailleres' non-cooperation, and its material and prejudicial effect upon appellant insurer.

2. Appellee has filed no cross-appeal herein concerning the trial court's refusal to award appellee the remaining $5,000.00 of appellant's policy limits over the financial responsibility limits.

Appellee's attack lies exclusively in her contention that the Arizona Supreme Court, in the Mayflower case, abrogated the policy defense of non-cooperation. A reading of the Mayflower case will, however, demonstrate that the Mayflower case merely holds the "omnibus" (permissive user) clause to be a mandatory part of all motor vehicle liability policies in Arizona, whether "certified" as proof of financial responsibility after an accident or not. In Mayflower, the Arizona court followed the lead of the California Supreme Court in the case of Wildman vs. Government Employment Insurance Co., 48 Cal.2d 31, 307 P.2d 359 (1957).

In Wildman, the California court held that an endorsement which purported to limit omnibus coverage only to members of the named insured's immediate family was invalid because of public policy. Wildman, however, is no longer the law in California. In 1963, the California Legislature amended the California Motor Vehicle Code §1650 to provide that the requirements thereof:

> "shall apply only to those policies which have been certified as proof of ability to respond in damages in §16-431."

Aside from California and Arizona, Florida is the only other jurisdiction in which the courts have read an omnibus clause into all policies whether certified or not because of the public policy manifested by the Financial Responsibility Law, Lynch-Davidson Motors vs. Griffin, 171 S.2d 911 (Florida Appellate 1965).

However, both in California and Florida, contrary to the holding of the trial court herein, the defense of non-cooperation is still available to an insurer. In the case of Campbell vs. Allstate Insurance Company, 60 Cal.2d 303, 384 P.2d 155 (1963), the California court clearly held that "an insurer may assert defenses based upon a breach by the insured of a condition of the policy such as a cooperation clause, * * *."

In Campbell, the California court relied upon its earlier decision in Hynding vs. Home Accident Insurance Co., 214 Cal. 743, 7 P.2d 999 (1932). In Hynding, the California court held that a breach of the cooperation clause by the insured relieved the insurer from liability to pay the injured parties judgment rendered against the insured. With reference to the California Financial Responsiblity Law, the court stated:

> "We see no escape from the conclusion that the violation of the co-operation clause by the assured was a valid defense against the injured party's action. We say this with the knowledge

> that in some cases it may work a hardship on such party, who is ordinarily in no position to force the assured to co-operate.
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> "It is not a compulsory insurance law, requiring every automobile owner or those in a particular class to secure insurance for the protection of the public generally. This latter type of statute, frequently found in the regulation of taxicabs and other carriers for hire, has usually been given a construction consonant with its purpose, as a result of which the injured party is permitted to recover against the insurance company regardless of the acts of the assured.
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> * * * * * *
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> "To require the co-operation of the assured to the extent of attendance at the trial, when he is a material and important witness, is a perfectly reasonable condition. Failure to testify may be as damaging as failure to give notice of the accident or of the suit. There is, of course, no obligation on his part to testify favorably to the company's interests, but here his report of the accident indicated that a defense existed, and it would normally be expected that his testimony would bear this out. Under these circumstances the company was clearly prejudiced by his failure to appear." (7 P.2d at 1002)

Likewise, the defense of non-cooperation is still available in Florida. Cf. American Fire and Casualty Co. vs. Collura, 163 So.2d 784 (Fla. App. 1964).

The reasoning of the court below in granting judgment in favor of appellee was essentially as follows:

1. In Mayflower the Arizona court held that the omnibus provisions of §28-1170 B, A. R. S., apply to all policies of motor vehicle liability insurance, whether certified or not.

2. The Arizona court must also have intended that §28-1170 F 1, A. R. S., which provides:

> "The liability of the insurance carrier with respect to the insurance required by this chapter shall become absolute when injury or damage covered by the motor vehicle liability policy occurs."

to also be a mandatory part of all policies of insurance, whether certified or not.

The authorities, however, are uniform that such "absolute liability" provisions (as §28-1170 F 1, A. R. S.) do not apply to a voluntary, non-certified policy of automobile liability insurance. In the case of Cohen vs. Metropolitan Casualty Ins. Co., 233 App. Div. 340, 252 N.Y.S. 841 (1931), the New York court stated:

> "A reading of the whole act, and, in particular, sections 94-i, 94-d and 94-e, convinces us that the words 'Motor Vehicle Liability Policy' as defined in the act must refer to 'required' policies only. To make the act applicable to all liability policies would mean that whenever such a mishap occurred the insurance carrier would always be absolutely liable under all circumstances. We cannot concur with this reading. The purpose to be furthered by the act, and its limitations, are clearly apparent. It is intended to protect the public from suffering loss through the carelessness of automobile owners who have manifested their financial irresponsibility. It differentiates between car owners who have shown themselves to be irresponsible, and those who have not. It declares that when those who carry liability policies through legal compulsion cause damage in automobile operation, their insurance carriers are absolutely liable for the resulting loss; but it lays down no such rule in the case of the automobile owner voluntarily carrying such a policy, whose

responsibility has never been questioned. The construction contended for by plaintiff would encourage fraud and deceit, and would create a legal relationship so unfair and unreasonable as to be unconscionable."

Other cases to the same effect are:

Adriaenssens vs. Allstate Insurance Company, 258 F.2d 888, 890 (10th Cir. 1958);

Aetna Casualty & Surety Co. vs. Simpson, 228 Ark. 157, 306 S.W.2d 117 (1957);

Connell vs. Indiana Insurance Company, 334 F.2d 993 (4th Cir. 1964);

DeVigil vs. General Accident Fire & Life Assurance Co., 146 F. Supp. 729 (D.C. Hawaii 1956);

Fidelity and Casualty Co. of N. Y. vs. McConnaughy, 228 Md. 1, 179 A.2d 117 (1962);

Gabler vs. Continental Casualty Company, 295 S.W.2d 194 (Mo. App. 1956);

Galford vs. Nicholas, 224 Md. 275, 167 A.2d 783 (1961);

Johnson vs. Universal Automobile Insurance Ass'n, 124 So.2d 580 (La. App. 1960);

Kentucky Farm Bureau Mut. Ins. Co. vs. Miles, 267 S.W.2d 928 (Ky. 1954);

McCarthy vs. Insurance Company of Texas, 271 S.W.2d 836 (Tex. Civ. App. 1954);

McLaughlin vs. Central Surety & Ins. Corporation, 11 N.J. Misc. 440, 166 Atl. 621 (1933);

National Surety Corporation vs. Diggs, 272 S.W.2d 604 (Tex. Civ. App. 1954);

State Farm Mut. Automobile Ins. Co. vs. Arghyris, 189 Va. 913, 55 S.E.2d 16 (1949);

Stollery Bros., Inc. vs. Inter-Insurance Exchange, 15 Ill. App.2d 179, 145 N.E.2d 768 (1957);

Temperance Insurance Exchange vs. Coburn, 85 Idaho 468, 379 P.2d 653 (1963);

Travelers Ins. Co. vs. Boyd, 312 Ky. 527, 228 S.W.2d 421 (1950); and

United States Fidelity and Guaranty Co. vs. Walker, 329 P.2d 852 (Okla. 1958).

CONCLUSION

Appellant respectfully submits that the authorities cited above establish that the court below erred in granting appellee's motion for summary judgment and in granting judgment in favor of appellee, and further that the court erred in failing to grant appellant's motion for summary judgment and in failing to grant judgment in favor of appellant on the basis that appellee's claim is excluded from the coverage of appellant's policy of insurance and further that by reason of the non-cooperation of Joel Bailleres, the insured, which non-cooperation constitutes a material and prejudicial breach of such policy, appellant is relieved from liability to both Bailleres and appellee. The judgment of the court below should be reversed with directions that judgment be entered in favor of appellant and against appellee.

Respectfully submitted,

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RECEIPT OF SERVICE

Due service and receipt of three copies of the foregoing Appellant's Reply Brief acknowledged this 3 day of November, 1965.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEROY W. HOFMANN